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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

WORLDCOM COMMENTS

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November 1, 2001

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SUMMARY

The Commission is seeking comments on the type of customer consent that is appropriate before a carrier may disclose to another entity or utilize customer proprietary network information ("CPNI") in marketing services to customers beyond those services that were the source of the CPNI. WorldCom believes the Commission should adopt a notice and "opt-out" approach, whereby carriers inform customers of potential use and disclosure of CPNI and provide the customers the option of restricting such use or disclosure. When properly structured, an opt-out regime strikes the proper balance in protecting customer privacy, fostering competition, and maintaining First Amendment rights.

First, accompanied with proper notification, an opt-out regime meets the objective of section 222 in ensuring customer control over the information. So long as consumers are properly instructed about the potential uses of CPNI, they will be able to exercise appropriate control over the process.

Second, the opt-out method provides carriers a more efficient means to obtain customer consent for disclosure of CPNI in order to meet their other statutory and regulatory obligations, as well as for their own use. While the section 222 of the Act may not address competition *per se*, Congress clearly did not intend for its privacy provision to subvert the overall objective of the Act or nullify carriers' obligations under any other statutory provisions. Therefore, when determining the best means to implement section 222 the Commission must consider the competitive implications.

Third, although the Tenth Circuit did not mandate that the Commission adopt an opt-out approach, it considered it to be an obvious and substantially less restrictive alternative to the opt-in approach.

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WORLDCOM COMMENTS

I. Introduction

WorldCom Inc. ("WorldCom") hereby responds to the Commission's *Second Further Notice of Proposed Rulemaking* (*Notice*) in the above-captioned docket. The *Notice* focuses on the issue of what type of customer consent is appropriate before a carrier may disclose to another entity or utilize customer proprietary network information ("CPNI") in marketing services to customers beyond those services that were the source of the CPNI. As explained more fully below, WorldCom believes the Commission should adopt a notice and "opt-out" approach, whereby carriers inform customers of potential use and disclosure of CPNI and provide the customers the option of restricting such use or disclosure. When properly structured, an opt-out regime strikes the proper balance in protecting customer privacy, fostering competition, and maintaining First Amendment rights.

When the Commission initially implemented section 222 of the Telecommunications Act of 1996, WorldCom, then MCI, supported the requirement ultimately adopted by the Commission that customers affirmatively "opt-in" to a plan that would allow their carrier to use CPNI to sell services outside of the current customer-carrier relationship. When the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") vacated the Commission's decision, having decided that the Commission's policy choice unlawfully interfered with commercial speech rights of the carrier, the industry was left to operate under the language in section 222 itself. Based on its experience in this environment, WorldCom now believes that an appropriately implemented opt-out regime can properly meet Congress' objectives in protecting consumer privacy and competitive interests, as well as address the court's First Amendment concerns. So long as consumers are properly instructed about the potential uses of CPNI, they will be able to exercise appropriate control over the process. Additionally, carriers are provided a more efficient means to obtain consent to use CPNI in a manner that benefits both consumers and competition in a way that is well within the bounds of customer expectations.

In any event, it is critical that the Commission strictly enforce the competitive provisions of the Communications Act, as amended, in order to serve the government's interest in protecting and promoting competition. In some cases, the opt-in approach was found to pose a conflict in carriers' compliance with section 222 and other sections of the Communications Act. WorldCom believes the opt-out approach greatly reduces such friction by providing carriers a more efficient means to obtain customer consent for disclosure of CPNI to another entity in order to meet its obligations under other statutory

provisions. Specifically, WorldCom comments address carrier obligations with regard to CPNI needed for initiating local service, CPNI used by Bell Operations Companies' ("BOC") section 272 affiliates, and preferred carrier freeze offerings.

II. Background

On February 26, 1998, the Commission promulgated regulations to implement section 222 of the Act in its *CPNI Order*.[1] Specifically, the Commission addressed the requirement that a carrier obtain customer approval for use of CPNI outside the telecommunications service from which it was derived. As the Commission recognized, with section 222, Congress sought to balance both competitive and consumer privacy interests regarding CPNI.[2] The Commission determined the best means to meet these statutory objectives was to require carriers to obtain express written, oral, or electronic approval by a customer - referred to as the opt-in approach - to use a customer's CPNI beyond the existing service relationship.[3] Subsequently, the Tenth Circuit, reviewing the case under constitutional standards applicable to regulations of commercial speech, vacated the Commission's *CPNI Order*.[4] The Tenth Circuit found that the Commission did not adequately consider the opt-out approach, which the court considered a substantially less restrictive alternative. As a result the court found that the Commission had not narrowly tailored the CPNI regulations to promote the government's asserted

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[1] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication's Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,* Second Report and Order, CC Docket Nos. 96-115 and 96-149 (rel. Feb. 26, 1998)("CPNI Order"). *See also* 47 U.S.C. 222.

[2] CPNI Order, para. 3, *citing* Joint statement of Mangers, S. Conf. Rep. No. 104-230 at 205, 104th Cong., 2d Sess., 1 (1996). *See also, US West v. FCC*, 182 F.3d 1224, 1236 (Aug. 18, 1999).

[3] CPNI Order, paras. 91 and 109.

[4] *US West v. FCC*, at 1233 and 1240.

interests, thereby raising First Amendment issues.[5] Consequently, the Commission has issued this *Notice*[6] seeking comments on what methods of customer consent would meet the governmental interests as well as the Tenth Circuit's First Amendment concerns.

III. Section 222 Allows for Full Use, Disclosure and Access to CPNI, and Therefore it Need Not Subvert the Competitive Goals of the Act

Section 222 was designed to provide consumers control over their CPNI. In particular, Congress sought to ensure "(1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other purposes; and (3) the right of consumers to stop the reuse or sale of that information."[7] Notably, section 222 does not purport to prohibit the disclosure or use of CPNI. Rather, it is designed to provide consumers with the tools to protect their privacy by providing them with information sufficient to allow them to make informed choices. Indeed, as the Tenth Circuit recognized, "[section] 222 contains measures that will allow for full use, *disclosure, and access* to CPNI if customer approval is obtained."[8]

In this regard it is critical to note that much of the Communications Act, in particular the amendments brought about by the Telecommunications Act of 1996, is designed to foster competition. Some of the Act's requirements entail the provision of access to information, including CPNI, to competing providers. While section 222 of the

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[5] *Id.*, at 1238-39.

[6] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication's Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,* Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149 (rel. Sept. 7, 2001)(Notice).

[7] S. Conf. Rep. No. 104-230 at 204, 104th Cong., 2d Sess., 1 (1996).

Act may not address competition *per se*, Congress clearly did not intend for its privacy provision to subvert the overall objective of the Act or nullify carriers' obligations under any other statutory provisions. Therefore, when determining the best means to implement section 222 the Commission must consider the competitive implications.

WorldCom submits that Congress' goals can be achieved through use of a notification and opt-out mechanism for obtaining customer consent. The critical element to this approach is the information that carriers must provide to consumers so that they can make an informed choice. Consistent with the statute, this disclosure should include a description of the information at issue, how it might be used, by whom it might be used, and that the customer has the right to prevent the reuse or sale of that information. Because this approach accomplishes all of the goals set forth in the text of section 222 while being less restrictive than an opt-in approach, it is consistent with the Tenth Circuit's ruling. As a matter of policy, the opt-out approach arms consumers with the information they need to make informed choices and exercise affirmative control over their CPNI while minimizing any unintended detriments to the goals of increasing competition and promoting free speech.

IV. Carriers Can Meet Their Other Statutory Obligations More Efficiently, While Protecting Customer Control, Through an Opt-Out Approach

The Commission has recognized that one of the principal goals established by the Telecommunications Act of 1996 is the opening of local exchange and exchange access

[8] *US West v. FCC*, at 1237 *emphasis added.*

markets to competitive entry.[9] Section 251, " . . . which seeks generally to reduce inherent economic and operational advantages possessed by incumbent local exchange carriers," is central to achieving this goal.[10] Another principle goal of the Act is the continuance of competition in telecommunications markets that are already open to competition, such as long distance services.[11] Section 272, which contains nondiscrimination safeguard provisions, is intended to prevent the BOCs from obtaining an unfair advantage upon entry into the long distance services market as a result of their local monopoly. Finally, although supporting the use of preferred carrier freezes as a means to reduce unauthorized conversions in customers' service providers, the Commission has recognized the need, and its authority under section 258, to eliminate the anticompetitive effects.[12] The Commission also has broad authority to end unjust and unreasonable practices.[13]

While the effect of some of these provisions with regard to the disclosure of CPNI is already under reconsideration in this docket,[14] it bears mention again here as the adoption of an opt-out regime may more conveniently and efficiently reconcile the various statutory objectives. Specifically, carriers that have statutory obligations to disclose or provide access to information that is considered to be CPNI will be able to meet their section 222 obligations by providing customers proper notification of such

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[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, para. 3 (rel. Aug. 8, 1996)("Local Competition Order").

[10] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, para.3 (rel Nov. 5, 1999)("UNE Remand").

[11] *See*, Local Competition Order, para. 3.

[12] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Second Report and Order, CC Docket No. 94-129, paras. 113 and 117 (rel. Dec. 23, 1998)(Section 258 Order).

[13] 47 U.S.C. 201(b).

disclosure and access, and the option to restrict the use, disclosure and access. In such circumstances, the Commission must clarify that carriers, motivated to avoid their statutory obligations, are prohibited from encouraging consumers to opt-out, and must be able to provide proof that the customer opted-out if the customer's decision prevents it from complying with its other statutory obligations.

A. ILECs Must be Required to Disclose Information Needed for Local Market Entry.

As WorldCom, then MCI WorldCom, noted in its Petition for Further Reconsideration, it has learned first-hand the critical role that access to customer service records (CSR), particularly customer feature information, plays in entering local markets that have formerly been the exclusive province of ILECs.[15] As discussed in the petition, most new local customers desire the same type of services they are used to receiving. Consequently, the majority of orders WorldCom receives for local service are "migrate as is," which means that the customer wants exactly the same features (e.g caller ID, three-way calling, call blocking) that they received from the incumbent. However, customers do not usually remember, and often cannot accurately describe, all aspects of their previous service. The result of not having access to this essential "installation" CPNI is that customer's expectations of service are not met. The customer becomes frustrated by needless delay, as the customer discovers that he or she failed to specify all of the service elements he or she wanted to continue and the new carrier must re-specify the correct list of features or the correct service plan to be provisioned. Such delays and problems with

[14] MCI WorldCom Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Nov. 1, 1999).

customers receiving the service they want interfere with the successful development of a competitive local market.[16]

After reviewing the Commission's previous consent requirements, WorldCom requested that the Commission clarify that an ILEC's failure to provide this information to a competing provider that has obtained express oral consent to be a violation of sections 251(c)(3) and (4).[17] In the *CPNI Reconsideration Order*, the Commission had recognized that, with customer consent, competing providers may be entitled to this information pursuant to those statutory provisions.[18] Adoption of an opt-out approach provides a more efficient means to obtain customer consent, thereby easing the conflict between the ILEC's statutory obligations.[19]

ILECs can meet their section 222 obligations through an opt-out regime that includes notification to its customer that it will provide such feature and service plan information to other carriers that need to view that information in the context of ordering local service. So long as a customer is aware that his CPNI may be provided to his new carrier should he elect to change carriers, and so long as the customer may request that his CPNI not automatically be made available for this purpose, the customer's privacy

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[15] *Id.*, at pp. 3-9.

[16] As also discussed in MCI WorldCom's petition, this same information is needed early in the sales conversation in order to enable consumers to make informed comparisons about whether they want to consider switching carriers. To a consumer, the ability to choose a local telephone provider is a new experience. Consumers naturally want to weigh the new and untried experience of local service provided by a new carrier against whatever experience they have with their incumbent provider. A new entrant can not provide accurate side-by-side comparison of the customer's costs unless the new entrant has an accurate description of the customer's features. *See Id.*, pp. 9-10.

[17] *Id.*, pp.10-12.

[18] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication's Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,* Order on Reconsideration, CC Docket Nos. 96-115 and 96-149, para. 85 (rel. Sept. 3, 1999)("CPNI Reconsideration Order").

interests are protected.[20] At the same time, this approach would remove any confusion on the part of the ILEC with respect to competing demands of sections 222 and 251.[21] Accordingly, the ILEC must be required to notify customers and provide this essential information to the competing LEC unless a customer affirmatively denies consent for such disclosure, in which case the requesting carrier would have to get the customer's express oral consent to access the information.

B. BOCs Must be Required to Treat Affiliated and Unaffiliated Entities in a Nondiscriminatory Manner with Regard to Disclosure of CPNI.

Section 272(c)(1) of the Act establishes nondiscrimination safeguards that are meant to ensure that, upon entry into the long distance market, a BOC treats all other entities the same as it treats its long distance affiliate. One of these safeguards requires that in its dealings with its affiliate, a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and *information* . . ."[22] In the *Non-accounting Safeguards Order* the Commission concluded that the term "information" in section 272(c)(1) includes, but is

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[19] WorldCom, however, still maintains its position that sections 222(c)(1) and 222(d)(1) authorize the disclosure of CPNI by former carriers, without customer consent, to new carriers to enable the new carriers to initiate service

[20] The ILEC's opt-out notification should inform customers that, should they decide to switch local exchange providers, their CSR, including feature information, will be disclosed to their chosen provider in order to migrate their service to the new service provider. Additionally, the ILEC's opt-out notification should also indicate that customer's local feature information would be provided to another carrier for purpose of a price comparison.

[21] In the *UNE Remand Order*, the Commission found that access to the ILEC's underlying operational support systems ("OSS") was necessary because ILECs "have access to exclusive information and functionalities needed to provide service [] e.g., customer service record information . . ." UNE Remand Order, para. 434. The Commission should clarify that an ILEC's failure to provide information needed by a competing provider to initiate service is a violation of section 251(c)(3) and (4). It cannot be that the Act requires the ILEC to provision unbundled network elements (alone or in combination) without the practical ability for the new entrant to place an accurate order.

[22] 47 U.S.C. 272(c)(1) *emphasis added.*

not limited to, CPNI and network disclosure information, specifically affirming that the nondiscrimination provision of section 272(c)(1) governs the BOCs' use of CPNI. As the Commission had previously noted, the statutory language does not limit the type of information that is subject to the section 272(c)(1) nondiscrimination requirement.[23]

In the *CPNI Order*, the Commission correctly concluded that section 222 permits the sharing of CPNI among affiliated entities if the use or disclosure is within the provision of the telecommunication service from which such information is derived, or if the carrier has obtain customer consent. The Commission also determined, however, that applying the section 272 nondiscrimination requirements on the BOCs dissemination of CPNI would prevent the BOCs from being able to share CPNI with their affiliates to the extent contemplated by section 222. The Commission's main concern was that obtaining expressed consent for multi-carriers would likely be so burdensome as to preclude the BOCs from seeking approval for affiliate sharing by means of oral solicitation. Consequently, the Commission revisited and overruled its prior conclusion that the "information" referenced in section 272 includes CPNI, thereby finding that section 272 imposed no additional requirements on BOC's when they share CPNI with their section 272 affiliate.[24] That decision was appealed to the United States Circuit Court of Appeals for the District of Columbia, which subsequently granted the Commission a voluntary remand.[25] Accordingly, the Commission seeks comment on the interplay between section 222 and section 272 of the Act. The Commission must revisit its decision in the *CPNI Order*, particularly if an opt-out approach were adopted.

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[23] *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order, CC Docket No. 96-149, para. 222 (rel. Oct. 1, 1999)(Nonaccounting Safeguard Order).

[24] CPNI Order, para. 154, *affirmed by,* CPNI Reconsideration Order, para. 140.

WorldCom maintains that, regardless of which approach the Commission adopts for carriers to obtain consent for use or disclosure of CPNI, the Commission must reverse it prior decision that section 272 does not impose any additional obligations on the BOCs with regards to the dissemination of CPNI. The specific language of section 272 requires nondiscrimination by the BOC regarding the provision of information between its affiliated and nonaffiliated carriers. Furthermore, under an opt-out approach, the BOC could comply with its 272 obligations without undue burden. If a BOC intends to seek consent for access by its affiliate under the opt-out approach, the BOC notification should also disclose that it will make access to such information available to unaffiliated entities on the same terms. If the BOC does not intend to disclose the information to the affiliate and therefore does not provide such notification on behalf of the affiliate, it would not be required to provide such notification on behalf of, or disclose the information to, unaffiliated entities. Accordingly, the Commission should require that, consistent with its Section 272 obligations, a BOC seeking consent to disclose CPNI to its affiliates must at the same time and in the same manner seek the customer's consent to provide such information on the same terms to nonaffiliated entities.

C. Carriers Implementing a Preferred Carrier Freeze Program Should be Required to Disclose a Customer's Preferred Carrier Freeze Status to Other Carriers.

The Commission, in the *CPNI Reconsideration Order*, found a customer's preferred carrier freeze status to be CPNI.[26] WorldCom maintains the position discussed in its Petition for Further Reconsideration that freeze status is not CPNI and the

[25] *AT&T v. FCC*, No. 99-1413 (D.C. Cir. July 25, 2000).

Commission has yet to explain how such information – which is completely separate and independent of the service itself – meets any aspect of the statutory definition.[27] Should the Commission decline WorldCom's pending petition, it should nevertheless rule that it a carrier must disclose the existence of a freeze to another carrier from whom the customer is ordering service.[28] There is no evidence that customers find this information to be particularly sensitive, and if one does, he would only need to inform his LEC of that fact under the opt-out approach. Consequently, carriers implementing a preferred carrier freeze program would need to inform their customers of such disclosure, and be required to share the information unless the customer elects otherwise.

The purpose of a freeze is to prevent an unauthorized switch of a customer's service provider. The Commission has recognized that freezes pose barriers to consumers' ability to change carriers. It, therefore, encouraged carriers to minimize the burden. WorldCom has found that one of the major obstacles in a customer's ability to change carriers is that the customers do not realize they have a freeze on their account or that they need to request the freeze be lifted prior to ordering service from a new carrier. If a customer does not remember that the service is "frozen" and a new carrier does not have independent access to information on the customer's freeze status, it will not know of the customer's need to first lift the freeze before submitting the order. As a result, its order will be rejected, needlessly frustrating the customer's intent. As the Commission acknowledged in its *Section 258 Order*, consumers benefit in terms of decreased confusion and inconvenience, when carriers are informed of the customer's freeze status

[26] CPNI Reconsideration Order, para. 147.
[27] MCI Petition For Further Reconsideration, p. 16.
[28] The Commission should find that it is an unjust and unreasonable practice not to disclose this information prior to the carrier's submission of an order on the customer's behalf. 47 U.S.C. 201(b). The

before or during an initial contact with a customer.[29] In addition to saving time and trouble in processing an order, it also saves carriers, and ultimately consumers, the cost of repetitive order processing.

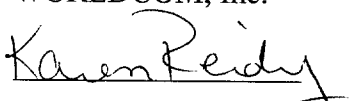
Accordingly, the Commission should require any carrier implementing a freeze program to solicit consent, through an opt-out approach, from customers to share freeze status information with other carriers from whom the customer is ordering service. Moreover, to ensure that carriers carry out this requirement fairly, the Commission should require that such consent be requested either at the same time any freeze is established or solicited, or as part of the carriers' request for consent to use the customers' CPNI information for its own purposes.

V. Conclusion

As discussed above, the Commission should adopt a notice and opt-out approach for carriers to obtain consent for disclose or use of CPNI outside the telecommunications service from which it was derived.

Respectfully submitted,

WORLDCOM, Inc.



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Commission also has authority to eliminate anticompetitive preferred carrier freeze practices under section 258 of the Act. *See* Section 258 Order, para. 117. *See also*, 47 U.S.C. 258.

[29] Section 258 Order, para. 133.